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Amir Hariri bin Abd Hadi v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL REFERENCE NO 06(RJ)-1–08 OF 2024(W)
TENGKU MAIMUN CHIEF JUSTICE, ABANG ISKANDAR PCA, NALLINI PATHMANATHAN, RHODZARIAH BUJANG FCJJ AND MOHD NAZLAN JCA
C 1 JULY 2025

Constitutional Law — Legislation — Validity of impugned legislation — Peaceful Assembly Act 2012 ('PAA') — Organiser of assembly was prosecuted under s 9(5) of PAA for not notifying police about holding of assembly five days D *before it was held as required by s 9(1) PAA — Whether s 9(5) was harsh and oppressive and effectively curtailed citizens' constitutional right under art 10(1)(b) of Federal Constitution ('FC') to assemble peacefully — Whether making the failure to give police notice of assembly an offence was a disproportionate legislative measure to ensure that notice was given — Whether threat of being prosecuted and* E *fined for not notifying police of intended assembly had chilling effect on would-be organisers and tantamount to effectively prohibiting such assemblies from being held*

The applicant, who was a political party member, organised a public rally in the F heart of Kuala Lumpur to protest against a 'scandal' involving the government's award of a contract to a company. The rally, attended by about 60 individuals, proceeded and ended peacefully. However, 12 days later, the applicant was charged in the magistrate's court under s 9(5) of the Peaceful Assembly Act 2012 ('the PAA') for failing to notify the officer in charge of the police district G ('OCPD') concerned about the holding of the rally five days before it was held, as required by s 9(1) of the PAA. The s 9(5) offence of failing to comply with s 9(1) was punishable with a fine not exceeding RM10,000. As the applicant wanted to challenge the constitutionality of s 9(5) PAA, the proceedings were stayed to allow him to refer constitutional questions to the High Court for H determination. The High Court, in turn, referred the questions to the Federal Court and they were the subject-matter of the instant proceedings. The main question for the Court's determination was whether s 9(5) of the PAA was unconstitutional for being inconsistent with art 10(2)(b) read with art 8 of the Federal Constitution ('the FC'). Article 10(2)(b) allowed Parliament to impose I such restrictions as it deemed necessary or expedient in the interests of national security or public order on the right (granted by art 10(1)(b) of the FC) to assemble peaceably. The applicant argued that by making non-compliance with s 9(1) of the PAA an offence, s 9(5) was not only unreasonable and disproportionate to the legislative intent of the PAA but effectively curtailed

the constitutional right to freedom of peaceful assembly. The applicant further submitted that: (a) s 9(5) was discriminatory for it punished only the organiser of an assembly but not its participants; (b) s 9(5) was incongruous in a legislation that provided for lawful and peaceful assemblies; (c) the police could resort to many other laws to deal with assemblies that were non-peaceful or unlawful; and (d) the threat of prosecution under s 9(5) would prohibit the holding of any urgent assembly within any period shorter than the time-period of notice stipulated in s 9(1) of the PAA. Apart from seeking a ruling to the main question posed, the applicant also prayed for a resolution to the contradictory decisions the Court of Appeal ('COA') had made with regard to the constitutionality of s 9(5) of the PAA. In *Nik Nazmi Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157 ('Nik Nazmi'), the COA had declared s 9(5) unconstitutional. But in *Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47 ('Yuneswaran'), the COA held that the provision was valid. In essence, the respondent submitted that s 9(5) PAA was not unconstitutional but necessary to compel the giving of notice under s 9(1) so that police would have advance notice of the holding of an assembly and have sufficient time to take steps to ensure that the it took place without any untoward incident.

Held, unanimously ruling that s 9(5) of the PAA was unconstitutional for being inconsistent with art 10(2)(b) read with art 8(1) of the Federal Constitution:

(1) Section 9(5) of the PAA failed to meet the threshold of proportionality espoused in art 8(1) of the FC. It was a discriminatory restriction that disproportionately curtailed the right to the freedom of peaceful assembly guaranteed by art 10(1)(b) of the FC. Section 9(5) was in excess of any restrictions that might be imposed on any of the permissible grounds stated in art 10(2)(b) of the FC (see paras 63–64 & 86).

(2) The doctrine of proportionality ensured that legislation or executive action must not only be objectively fair but must also be proportionate to the object sought to be achieved, namely, the aim of and reasons for the restrictions. Proportionality, as espoused in the overriding provisions on equality and equal protection of the law in art 8(1) of the FC, advocated for a substantive limit against Parliament's power to legislate as it pleased under the guise of valid legislative restrictions on fundamental liberties (see paras 52 & 56–57).

(3) As s 9(5) was not validly enacted under art 10(2)(b) of the FC and could not be deemed as validly restricting the right guaranteed to all citizens by art 10(1)(b) of the FC but, in fact, violated that right, it had to be struck down as null and void under art 4(1) of the FC (see para 87).

(4) The court could not agree with the respondent that s 9(5) simply sought to incentivise or strictly enforce the notice requirement in s 9(1) so as to protect, preserve or balance on the one side public order and security and

on the other, the constitutional right to assemble peaceably. The respondent's reading of s 9(5) was only valid if a myopic view of s 9(5) was adopted, ignoring the rest of its legal implications and overall chilling effects on an otherwise valid legal right to assemble peaceably and without arms. There was much force in the applicant's submission that s 9(5) appeared to be a blanket prohibition rather than a restriction (see paras 68–69).

(5) If, as suggested by the respondent, s 9(5) of the PAA was enacted to ensure that the police were notified of any upcoming assembly so that they could be on guard to take protective action, then such an intention was clearly not manifest in the way it was couched. Instead, s 9(5) imposed a separate and onerous duty on the organiser of an assembly to provide notice quite apart from the nature of the assembly. And if the organiser failed to give the requisite notice, he could be charged with and convicted of an offence under s 9(5) even if the assembly took place and ended peacefully. This offence discriminated the organiser against the participants of the assembly who committed no offence whilst the organiser was guilty of one (see paras 66–67).

(6) Section 9(5) bore several implications that matched it as a prohibition on the right to hold a peaceful assembly: (a) any person who organised an assembly without giving prior notice of it to police was liable to be criminally sanctioned; (b) urgent assemblies that had to be held sooner than the time period of notice specified in s 9(1) could not be held; (c) the organiser of an assembly who had not given the requisite notice would be prosecuted but no such action would befall the participants of the assembly; (d) the fear of prosecution would discourage the organising of assemblies; and (e) s 9(5) bore no nexus to the preservation of public order and security outlined in art 10(2)(b) of the FC because even if the assembly was held peacefully, the organiser could still be prosecuted for breaching s 9(1)(vi) regardless of s 9(1) of the PAA, the police were empowered under the law to take action if an assembly turned unruly, became unlawful or ceased to be peaceful (see paras 72–75).

(7) The COA was correct to hold in *Nik Nazmi* that s 9(5) of the PAA was unconstitutional but it wrongly held in *Yuneswaran* that s 9(5) was valid. *Yuneswaran* was hereby overruled and shall have no value as judicial precedent (see para 88).

[Bahasa Malaysia summary

Pemohon yang merupakan ahli parti politik, menganjurkan perhimpunan awam di tengah-tengah Kuala Lumpur untuk membantah 'skandal' pemberian kontrak kerajaan kepada sebuah syarikat. Perhimpunan itu yang dihadiri oleh kira-kira 60 individu, diteruskan dan berakhir dengan aman. Walau bagaimanapun, 12 hari kemudian, pemohon didakwa di mahkamah majistret

di bawah s 9(5) Akta Perhimpunan Aman 2012 ('APA') kerana gagal memaklumkan Pegawai Penjaga Polis Daerah ('OCPD') untuk mengadakan perhimpunan itu lima hari sebelum ianya diadakan, seperti yang dikehendaki oleh s 9(1) APA. Kesalahan s 9(5) iaitu gagal mematuhi s 9(1) boleh dihukum dengan denda tidak melebihi RM10,000. Oleh sebab pemohon ingin mencabar keperlembagaan s 9(5) APA, prosiding telah ditangguhkan untuk membolehkannya merujuk soalan perlembagaan kepada Mahkamah Tinggi untuk penentuan. Mahkamah Tinggi, seterusnya merujuk soalan-soalan itu kepada Mahkamah Persekutuan dan ianya adalah subjek prosiding ini. Persoalan utama untuk penentuan mahkamah adalah sama ada s 9(5) APA adalah tidak berperlembagaan kerana tidak konsisten dengan perkara 10(2)(b) yang dibaca dengan perkara 8 Perlembagaan Persekutuan ('PP'). Perkara 10(2)(b) membenarkan Parlimen mengenakan sekatan yang difikirkan perlu atau wajar demi kepentingan keselamatan negara atau ketenteraman awam ke atas hak untuk berhimpun secara aman (menurut perkara 10(1)(b)PP). Pemohon berhujah bahawa dengan menjadikan ketidakpatuhan kepada s 9(1) APA sebagai kesalahan, s 9(5) bukan sahaja tidak munasabah dan tidak seimbang dengan niat perundangan APA tetapi menyekat hak perlembagaan untuk kebebasan berhimpun secara aman. Pemohon seterusnya berhujah bahawa: (a) s 9(5) adalah diskriminasi kerana ianya hanya menghukum penganjur perhimpunan tetapi bukan pesertanya; (b) s 9(5) tidak sesuai dalam undang-undang yang memperuntukkan perhimpunan yang sah dan aman; (c) polis boleh menggunakan undang-undang lain untuk mengawal perhimpunan yang tidak aman atau menyalahi undang-undang; dan (d) potensi pendakwaan di bawah s 9(5) akan melarang mengadakan sebarang perhimpunan segera dalam mana-mana tempoh yang lebih pendek daripada tempoh masa notis yang ditetapkan menurut s 9(1) APA. Selain untuk keputusan kepada persoalan utama, pemohon juga memohon untuk penyelesaian kepada penghakiman bercanggah yang dibuat oleh Mahkamah Rayuan ('MR') berkenaan dengan keperlembagaan s 9(5) APA. Dalam kes *Nik Nazmi Nik Ahmad v Pendakwa Raya* [2014] 4 MLJ 157 ('Nik Nazmi'), MR telah mengisytiharkan s 9(5) sebagai tidak berperlembagaan. Tetapi dalam kes *Pendakwa Raya v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47 ('Yuneswaran'), MR berpendapat bahawa peruntukan itu sah. Pada dasarnya, responden menghujahkan bahawa s 9(5) APA tidak melanggar perlembagaan tetapi merupakan keperluan untuk pemberian notis di bawah s 9(1) supaya polis mendapat notis awal tentang perhimpunan dan mempunyai masa yang mencukupi untuk mengambil langkah-langkah untuk memastikan bahawa tiada sebarang insiden yang tidak diingini berlaku.

Diputuskan, sebulat suara memutuskan bahawa s 9(5) APA tidak berperlembagaan kerana tidak konsisten dengan perkara 10(2)(b) dibaca bersama perkara 8(1) Perlembagaan Persekutuan:

(1) Seksyen 9(5) APA gagal memenuhi ambang perkadaran yang menurut

perkara 8(1) PP. Ianya merupakan diskriminasi yang secara tidak seimbang yang menyekat hak kebebasan berhimpun secara aman yang dijamin oleh perkara 10(1)(b) PP. Seksyen 9(5) melebihi sebarang sekatan yang mungkin dikenakan ke atas sebarang alasan yang dibenarkan menurut perkara 10(2)(b) PP (lihat perenggan 63–64 & 86).

(2) Doktrin perkadaran memastikan bahawa perundangan atau tindakan eksekutif bukan sahaja mestilah adil secara objektif tetapi juga mesti berkadar dengan tujuan yang ingin dicapai, iaitu, matlamat dan sebab sekatan. Perkadaran, seperti yang disokong dalam peruntukan utama mengenai kesamarataan dan perlindungan undang-undang yang sama rata menurut perkara 8(1) PP, menggalakkan had substantif terhadap kuasa Parlimen untuk menggubal undang-undang sesuka hati di bawah penyamaran sekatan perundangan yang sah mengenai kebebasan asasi (lihat perenggan 52 & 56–57).

(3) Memandangkan s 9(5) tidak digubal secara sah menurut perkara 10(2)(b) PP dan tidak boleh dianggap sebagai menyekat hak yang dijamin kepada semua warganegara menurut perkara 10(1)(b) PP. Namun peruntukan tersebut sebenarnya melanggar hak itu dan harus dibatalkan dan dianggap sebagai tidak sah menurut perkara 4(1) PP (lihat perenggan 87).

(4) Mahkamah tidak boleh bersetuju dengan responden bahawa s 9(5) hanya bertujuan untuk memberi insentif atau menguatkuasakan keperluan notis dengan ketat untuk melindungi, memelihara atau mengimbangi di satu pihak ketenteraman dan keselamatan awam. Di sisi lain, memberikan hak perlembagaan untuk berhimpun secara aman. Pembacaan responden menurut s 9(5) hanya sah sekiranya pandangan kabur mengenai s 9(5) diterima pakai, mengabaikan implikasi undang-undangnya yang lain dan kesan buruk terhadap keseluruhan hak undang-undang yang sah untuk berhimpun secara aman dan tanpa senjata. Hujahan pemohon adalah kuat yang menyatakan bahawa s 9(5) secara tersirat merupakan larangan menyeluruh dan bukannya sekatan (lihat perenggan 68–69).

(5) Sekiranya, seperti yang dicadangkan oleh responden, s 9(5) APA digubal untuk memastikan bahawa polis dimaklumkan tentang sebarang perhimpunan yang akan datang supaya mereka boleh berjaga-jaga untuk mengambil tindakan perlindungan, cara dan tujuan tersebut tidak dinyatakan secara jelas. Sebaliknya, s 9(5) mengenakan kewajipan yang berasingan dan membebankan penganjur perhimpunan untuk memberikan notis yang berlainan dengan sifat perhimpunan. Sekiranya penganjur gagal memberikan notis yang diperlukan, dia boleh didakwa dan disabitkan dengan kesalahan di bawah s 9(5) walaupun perhimpunan itu berlangsung dan berakhir dengan aman. Kesalahan ini mendiskriminasi penganjur kerana peserta perhimpunan tidak

melakukan kesalahan manakala penganjur pula dikatakan melakukan kesalahan (lihat perenggan 66–67).

(6) Seksyen 9(5) mempunyai beberapa implikasi sebagai larangan ke atas hak untuk mengadakan perhimpunan aman: (a) mana-mana orang yang menganjurkan perhimpunan tanpa memberi notis terlebih dahulu kepada polis dianggap melakukan jenayah; (b) perhimpunan secara segera yang perlu diadakan lebih awal daripada tempoh masa notis yang dinyatakan dalam s 9(1) tidak boleh diadakan; (c) penganjur perhimpunan yang tidak memberi notis yang diperlukan akan didakwa tetapi tiada tindakan sedemikian akan dikenakan terhadap peserta perhimpunan; (c) ancaman pendakwaan akan menghalang penganjuran perhimpunan; dan (d) s 9(5) tidak mempunyai kaitan dengan pemeliharaan ketenteraman dan keselamatan awam menurut 10(2)(b) PP kerana walaupun perhimpunan itu diadakan secara aman, penganjur masih boleh didakwa kerana melanggar s 9(1)(vi) kerana menurut s 9(1) APA, polis diberi kuasa di bawah undang-undang untuk mengambil tindakan sekiranya perhimpunan bertukar menjadi tidak terkawal, menyalahi undang-undang atau tidak lagi aman (lihat perenggan 72–75).

(7) MR dalam kes *Nik Nazmi* betul dalam memutuskan bahawa s 9(5) APA sebagai tidak berperlembagaan. Namun, kes *Yuneswaran* adalah salah kerana memutuskan bahawa s 9(5) adalah sah. Dengan ini, kes Yuneswaran ditolak dan tidak boleh dijadikan duluan kehakiman (lihat perenggan 88).]

Cases referred to

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1, FC (refd)
Dalip Bhagwan Singh v PP [1998] 1 MLJ 1, FC (refd)
Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213, CA (refd)
Lai Hen Beng v PP [2024] 1 MLJ 225, FC (refd)
Letitia Bosman v PP and other appeals (No 1) [2020] 5 MLJ 277, FC (refd)
Mlungwana and Others v S and Another [2018] ZACC 45 (refd)
Nik Nazmi bin Nik Ahmad v PP [2014] 4 MLJ 157, CA (folld)
PP v Pung Chen Choon [1994] 1 MLJ 566, SC (refd)
PP v Azmi bin Sharom [2015] 6 MLJ 751, FC (refd)
PP v Yuneswaran a/l Ramaraj [2015] 6 MLJ 47, CA (overd)
Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333, FC (refd)
Young v Bristol Aeroplane Company, Limited [1944] KB 718, CA (refd)

Legislation referred to

Courts of Judicature Act 1964
Dangerous Drugs Act 1952 s 37A

A Federal Constitution arts 4(1), 5(1), 8(1), 10, 10(1), 10(1)(a), (1)(b), (2), (2)(a), (2)(b)
Peaceful Assembly Act 2012 ss 2, 9, 9(1), (5), 15, 20(1), 21(1), (3), 21A
Penal Code ss 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151,
B 152, 153, 154, 155, 156, 157, 158, 159, 160, Chapter VIII
Police Act 1967 s 27
Regulation of Gatherings Act 205 of 1993 [ZA] s 12(1)(a)
Societies Act 1966

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Tengku Maimun Chief Justice (delivering judgment of the court):

F INTRODUCTION

[1] These proceedings concern the constitutional validity of sub-s 9(5) of the Peaceful Assembly Act 2012 (Act 736) ('the PAA 2012') vis a vis art 10 of the
G Federal Constitution ('the FC').

[2] As sub-s 9(5) is a criminal provision predicated on the non-performance of a statutorily mandated act under sub-s 9(1) of the PAA 2012, sub-s 9(5) must be read with sub-s 9(1), and they provide:

H 9 Notification of Assembly

(1) An organiser shall, five days before the date of an assembly, notify the Officer in charge of the police District in which the assembly is to be held.

(2) ...

I (3) ...

(4) ...

(5) A person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit.

[3] To be clear, the applicant only assails the constitutional validity of the penal provision in sub-s 9(5) that seeks to punish non-compliance with the notification requirement in sub-s 9(1) but he does not otherwise impugn the constitutional validity of sub-s 9(1) itself.

[4] Before we proceed further with this judgment, and for the avoidance of doubt, and unless stated otherwise, any references to 'section(s)' in this judgment shall be taken as referring to the section(s) of the PAA 2012. Likewise, any references to 'Article(s)' in this judgment shall, unless otherwise stated, be construed as references to the article(s) of the FC.

[5] Clauses (1)(b) and (2)(b) of art 10, against which the validity of sub-s 9(5) is principally called into question, in turn guarantee thus:

> 10 Freedom of speech, assembly and association
>
> (1) Subject to Clauses (2), (3) and (4) —
>
> (a) ...;
>
> (b) all citizens have the right to assemble peaceably and without arms;
>
> (c) ...;
>
> (2) Parliament may by law impose —
>
> (a) ...;
>
> (b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order; ...

[6] The case advanced by the applicant is that s 9(5) is void under art 4(1) because it violates cll (1)(b) and 2(b) of art 10, and that it should accordingly be struck down.

[7] What is uniquely interesting in this case is that the Court of Appeal in a previous decision in *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157 ('Nik Nazmi') had already declared s 9(5) unconstitutional for the reasons advanced therein. However, in a later decision in *Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47 ('Yuneswaran'), the Court of Appeal radically departed from its reasoning in *Nik Nazmi* and held the complete opposite — that sub-s 9(5) is not unconstitutional.

[8] It must be noted for completeness that s 9 was amended in 2019 vide the Peaceful Assembly (Amendment) Act 2019 (Act A1600) to reduce the notification period in sub-s 9(1) from 'ten days' to the presently existing period of 'five days'. Subsection 9(5) remains intact in that a failure to make the

notification within the five days is still an offence and punishable in the manner described in that subsection.

[9] As such, and further noted for completeness is that though the aforementioned amendment was made four years after the Court of Appeal decision in *Yuneswaran,* the amendment itself is of no consequence to the present challenge.

[10] This is because, and at the risk of repetition, what the applicant is now challenging is not the mandatory requirement for the organiser to give notice to the Officer in charge of the Police District prior to holding the peaceful assembly nor the length of the notice period; rather it is the criminalisation in sub-s 9(5) of the organiser's failure to give such notice be it five days prior or ten days prior to the peaceful assembly as per sub-s 9(1).

[11] For this reason, the *ratio decidendi* and the substratum of the challenges in both *Nik Nazmi* and *Yuneswaran* as regards the constitutional validity of sub-s 9(5) remain, in some sense, germane to the present challenge.

BACKGROUND

[12] The applicant is a high-ranking member of a Malaysian political party. On 14 August 2022, he organised a rally at the Sogo Complex at Jalan Tuanku Abdul Rahman, Kuala Lumpur. The purpose was to protest a contract awarded by the Ministry of Defence to a certain corporation. The applicant labelled this contract as a scandal because, as he alleged, the contract was never performed.

[13] The rally that he organised on 14 August 2022 took place at around 2pm on that date and was attended by some 60 individuals.

[14] On 26 August 2022, the applicant was charged in the magistrate's court for an offence under sub-s 9(5) ie for organising the said rally without prior notification as required by sub-s 9(1).

[15] From the overall context of the case and the facts as they appear from the record, and without prejudicing the applicant's defence to the sub-s 9(5) criminal charge, the following material facts are undisputed:

(a) no person who attended the rally other than the applicant was charged with an offence under sub-s 9(5); and

(b) the rally that the applicant organised and which took place on 14 August 2022 was organised as a peaceful assembly and indeed ended peacefully.

[16] Consistent with the provisions of the Courts of Judicature Act

1964 ('the CJA 1964'), the applicant applied to refer constitutional questions from the magistrate's court to the High Court and which the High Court further transmitted to this court culminating in this constitutional reference.

[17] The two questions that are posed for this court's determination in this special case are as follows ('questions'):

Question 1

First Part: Whether s 9(5) of the PAA 2012 is unconstitutional for being inconsistent with art 10(2)(b) read with art 8 of the FC?

Second Part: Arising from this, whether the Court of Appeal in *Nik Nazmi bin Nik Ahmad v Public Prosecutor* [2014] 4 MLJ 157 which decided that s 9(5) of the PAA 2012 is unconstitutional or the Court of Appeal in *Public Prosecutor v Yuneswaran a/l Ramaraj* [2015] 6 MLJ 47 which decided that s 9(5) of the PAA was constitutional was correct in light of the established principle of law that the Court of Appeal is bound by its earlier decisions as propounded in the Supreme Court case in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1.

Question 2

Whether s 9(5) of the PAA 2012 is unconstitutional for being inconsistent with art 10(2)(a) of the FC on the right to freedom of speech and expression read with art 8 of the FC.

[18] As will be noted and for the avoidance of doubt, we have divided question 1 into 'First Part' and 'Second Part'.

SUBMISSIONS

The appellant's case

[19] Premised on the questions, the applicant's contentions are effectively two-fold.

[20] First, a large bulk of their arguments centre on the dichotomy between the two cases of *Nik Nazmi* and *Yuneswaran.* We shall refer to this as the 'First Point' or 'Stare Decisis' point which arises from the Second Part of question 1.

[21] The fulcrum of the stare decisis argument is the timeless English decision in *Young v Bristol Aeroplane Company, Limited* [1944] KB 718 ('Young') which was followed in Malaysia in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 ('Dalip') for the proposition of law that the Court of Appeal is bound by its prior decisions and accordingly, cannot depart from them unless certain exceptions are met. According to the applicant, none of those exceptions applied and as such the Court of Appeal in *Yuneswaran* had no legal basis to depart from its own earlier pronouncement in *Nik Nazmi.*

[22] The argument does not stop there. It goes further to contend that at the time *Yuneswaran* was decided, the Federal Court had already rendered judgment in *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333 ('Sivarasa') which held that the reasonableness test applies, contrary to a much earlier Supreme Court decision in *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566 ('Pung'). The Court of Appeal in *Yuneswaran* applied *Pung* against the Federal Court's direction in *Sivarasa* and in doing so, further defied stare decisis.

[23] As such, the main target of the first point is purely the technical ground of stare decisis and the primary motive behind it is for this court to settle the conflict in the two diverging decisions in *Nik Nazmi* and *Yuneswaran.* The applicant urges us, in effect, to declare that *Yuneswaran* was decided *per incuriam* and to thereby uphold the decision in *Nik Nazmi* as correct to the extent that *Nik Nazmi* declared sub-s 9(5) unconstitutional and struck it down under art 4(1).

[24] The second major aspect of the argument substantively addresses the constitutional validity of sub-s 9(5) against art 10(2) read with art 8(1) premised on the latest decisions that relate to the notions of the 'reasonableness test' and 'proportionality' established respectively in *Sivarasa* and *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 ('Alma Nudo').

[25] Clause (1)(b) of art 10 guarantees that all citizens have the right to assemble peaceably and without arms. Article 10(2), however, says that Parliament may by law impose such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order, against the right to peaceful assembly guaranteed in art 10(1)(b).

[26] In this regard and in respect of the second point is the applicant's contention that in line with cases such as *Sivarasa, Nik Nazmi,* and *Alma Nud*o, any restrictions that Parliament may by law impose must be reasonable and/or proportionate to the legitimate aims of that law and that in this case, sub-s 9(5) is neither reasonable nor proportionate. As such, the applicant asserts that substantively, sub-s 9(5) is inconsistent with cll 10(1)(b) and 10(2)(a) and (b) and accordingly, it should be declared null and void and be struck down under art 4(1).

[27] The argument also extends in principle to art 10(1)(a) and 10(2)(a) to the extent that they concern the right to free speech and expression and whether the restriction enacted by Parliament in sub-s 9(5) imposes a disproportionate statutory restriction on those rights.

The respondent's case

[28] On the first point which relates to stare decisis, the respondent does not take any issue with judicial articulations on the principles of judicial precedent. They agree and accept the principles stated in *Young* and *Dalip*. Having accepted them, the respondent's position is that in deciding *Yuneswaran,* the Court of Appeal was entitled to depart from *Nik Nazmi.*

[29] The respondent's reasoning is this. *Nik Nazmi* was a decision of the Court of Appeal and it was therefore bound by the higher authority in *Pung*. The respondent submits that the Court of Appeal in *Yuneswaran* correctly observed that *Nik Nazmi* should not be followed as the Court of Appeal in that case was bound to follow *Pung* and not *Sivarasa.*

[30] The respondent further submits that the Federal Court's articulation of the 'reasonableness test' in *Sivarasa* was only *obiter dicta* whereas in *Pung,* it was ratio and therefore binding on the Court of Appeal in *Nik Nazmi*. It was thus imperative on the Court of Appeal there to follow *Pung* and not *Sivarasa.* As such, the respondent highlights how the Court of Appeal later in *Yuneswaran* noted this mistake and correctly followed *Pung*'s case.

[31] Putting it in simpler terms, the respondent's case is that the Court of Appeal in *Yuneswaran* was entitled to depart from *Nik Nazmi* consonant with the principles established in *Young* and *Dalip* as, in the first place, and as the respondent seems to hint: *Nik Nazmi* was decided per incuriam.

[32] Additionally, the respondent appears to suggest that any discrepancies that arose out of the conflict between *Nik Nazmi* and *Yuneswaran* was eventually settled by this court, the apex court, in *Public Prosecutor v Azmi bin Sharom* [2015] 6 MLJ 751 ('Azmi bin Sharom'). By having overruled *Sivarasa* on the 'reasonableness test' and accepting the principles articulated in *Pung,* the Federal Court effectively took the same approach as the Court of Appeal in *Yuneswaran.* As such, the respondent submits that *Yuneswaran* is both substantively a correct decision and procedurally not invalid for having departed from *Nik Nazmi.*

[33] In any case, the respondent does not submit much on the stare decisis point. Rather, learned deputy public prosecutor spends more time addressing the applicant's second point that concerns the substantive validity of sub-s 9(5) as tested against art 10(1)(a) and (b) and art 10(2)(a) and (b). The respondent recanvassed the arguments relating to the 'reasonableness test' and why it is not applicable by reference to the drafting history of art 10. These arguments appear to have been adopted and accepted in *Azmi bin Sharom* and we do not consider it necessary to repeat them.

[34] Nevertheless, the respondent accepts that the doctrine of

proportionality remains applicable to art 10 by reference to *Azmi bin Sharom* which held the doctrine applicable in Malaysia and in which case the Federal Court proceeded to deliberate on the validity of another unrelated statutory provision on the basis of proportionality. In accepting that any restrictions that Parliament may impose by law through art 10(2) are not without limit and are subject to proportionality, the Federal Court in *Azmi bin Sharom* stated:

> [43] In this regard, we agree with the learned judge in *Sivarasa Rasiah,* that the restriction that may be imposed by the Legislature under art 10(2) is not without limit. This means to say that the law promulgated under art 10(2) must pass the proportionality test in order to be valid. This, in our view is in line with the test laid down in *Pung Chen Choon* discussed earlier ...

[35] In their submission, the respondent asserts that sub-s 9(5) is not disproportionate to the legitimate aim of its enactment. To be clear, in making this submission, the respondent has addressed two important facets. The first facet concerns whether there was, in Parliament's passing of sub-s 9(5), a legitimate aim behind it. Second, whether the modality adopted in sub-s 9(5) is a proportionate legislative measure commensurate to that legitimate aim.

[36] In relation to the first facet, we find that there is not really a significant dispute. The aims for which Parliament can pass laws such as the PAA 2012 generally and sub-s 9(5) thereof specifically to restrict the right to freedom of peaceful assembly are enumerated in art 10(2)(b) ie on grounds where Parliament deems such restrictions necessary or expedient in the interest of the security of the Federation or any part thereof or public order.

[37] The larger question in this case is whether sub-s 9(5) is a proportionate measure to those legitimate constitutional aims. As stated earlier, the respondent suggests that sub-s 9(5) is a proportionate legislative measure to restrict the right of freedom of peaceful assembly on those constitutional grounds, for the following reasons as stated in their primary written submissions at [34]:

(a) the legislative intent behind the passing of the PAA 2012 in general is to regulate assemblies held in public places and to provide protection for the rights and freedoms of others (peaceful enjoyment of their property, freedom of movement, enjoyment of the natural environment and conducting business);

(b) that the above is evinced by the preamble to the PAA 2012 to the extent that the Act was passed to fairly restrict the right to assemble peaceably and without arms, and to provide for such restrictions as may be necessary or expedient in relation to that right in the interests of the security of the Federation or any part thereof or public order, including the protection of the rights and freedoms of others;

(c) in s 2 of the PAA 2012 reiterates Parliament assurances that all citizens have the right to organise assemblies or to participate in assemblies, peaceably and without arms and that the exercise of that right shall be subject only to such restrictions as are necessary or expedient in a democratic society in the interests of the security of the Federation or any part thereof or of public order, including the protection of the rights and freedoms of others;

(d) in relation to sub-s 9(1), the legislative intention is, among others, to enable interested persons to express any concerns or objections to the assembly. In support of this, the respondent relies on the following statement of the then Minister, Dato' Seri Mohamed Nazri Abdul Aziz, who in moving the Peaceful Assembly Bill 2011, said in Parliament as follows (see: DR, 29 November 2011, at pp 57–58):

> Dalam perkara ini, fasal 9(1) hendaklah dibaca bersama dengan fasal 14 bahawa apabila polis menerima notis pemberitahuan perhimpunan daripada penganjur, polis perlu memberi respond dalam masa lima hari sahaja. Sekiranya polis gagal untuk memberi respond terhadap pemberitahuan itu, perhimpunan itu hendaklah diteruskan. Itu dia, bagi polis lima hari untuk respons.
>
> Jadi, dalam masa lima hari ini perkara-perkara berikut hendaklah dilakukan:
>
> (i) perjumpaan pihak polis dengan penganjur sebaik sahaja diberitahu tentang perhimpunan yang akan diadakan seperti yang diperuntukkan dalam fasal 13;
>
> (ii) PDRM untuk memaklumkan kepada orang yang mempunyai kepentingan dalam tempoh 24 jam; dan
>
> (iii) orang-orang yang mempunyai kepentingan memaklumkan sebarang kebimbangan atau bantahan terhadap perhimpunan kepada PDRM dalam tempoh 48 jam;

(e) in other words, the enactment of sub-s 9(1), is, and among other reasons, to enable interested persons to raise any concerns or objections against the intended assembly. The imposition of an offence and fine on the organiser of an assembly who fails to notify the Officer in Charge of the Police District where the assembly will be held under sub-s 9(5) serves as a deterrent against all organisers who fail to comply with sub-s 9(1) consistent with the objective of the PAA 2012 to provide protection for the rights and freedoms of others who benefit from public order and security;

(f) the collective restrictions in sub-ss 9(1) and (5) are not, whether taken together or separately, a total prohibition or restriction on any person intending to assemble peacefully and without weapons; and

(g) the requirement to notify the police in sub-s 9(1) is a legislative measure

A that Parliament deems necessary or expedient to enable a balance to be struck between the right to assemble and the protection of public rights and order. The enforcement of sub-s 9(1) through sub-s 9(5) is therefore an attendant necessity. In support of their general proposition on sub-s 9(1) the respondent also places reliance on the judgment of this court in
B *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 ('Letitia Bosman') to the extent that the Federal Court held that the appropriate party to determine legal policy is Parliament and not the courts.

C

[38] The respondent then urges us to uphold the decision in *Yuneswaran* as being correct to the extent that it held, consistent with the reasons given by the respondent above on its validity, that sub-s 9(5) is not unconstitutional.

D **[39]** If we understand the respondent correctly, their submission may be summarised thus. The PAA 2012 was passed specifically with the intention to promote peaceful assemblies and to impose legitimate restrictions on that right in line with the grounds permissible in art 10(2)(b). The basis for enacting sub-s 9(1) is to allow the police to know first-hand about intended assemblies
E and to take appropriate measures after that to secure those assemblies if need be.

[40] As such, the intention (according to the respondent) behind sub-s 9(5) is clear in that it seeks to punish any person who organises any peaceful
F assembly without providing prior notification to the police per sub-s 9(1). The prosecution of such persons is not a disproportionate measure in that it enables the government to ensure, among other things, public order and security of the Federation by in effect, incentivising the giving of notice upon the fear of criminal punishment.

G

[41] We have also benefited from written and oral submissions from various amici curiae on the legal validity of sub-s 9(5) and we thank them for their efforts. We shall only refer to their submissions of law wherever and whenever necessary to address any arguments not already addressed with sufficient detail
H by either party to these proceedings.

ANALYSIS/DECISION

Stare decisis

I

[42] As stated earlier, a large bulk of the applicant's arguments centre on the dichotomy between the two Court of Appeal decisions in *Nik Nazmi* and *Yuneswaran* and how they did not comply with the trite principles of stare decisis long established in *Young* and *Dalip*.

[43] However, looking at the bigger picture, we must admit that such a finding does very little in terms of deciding the constitutional validity of sub-s 9(5) by reference to just *Nik Nazmi* and *Yuneswaran.* The fact remains that after *Yuneswaran* was decided, the Federal Court rendered its decision in *Azmi bin Sharom* wherein this court did, in part, endorse the decision in *Pung* to the extent of rejecting the 'reasonableness test'.

[44] As such, the larger question warrants a proper restatement of the law as it relates to art 10 and the principles of proportionality espoused by the apex Court decisions in *Azmi bin Sharom* and other cases beyond what was already decided in *Nik Nazmi* and *Yuneswaran.*

Article 10 and proportionality

[45] The Court of Appeal in *Nik Nazmi* was in large part persuaded by the decision in *Sivarasa* which held that Parliament can only impose legislative restrictions that pass the 'reasonableness test'. On the other hand, the Federal Court in endorsing *Pung* in *Azmi bin Sharom* effectively preferred the proportionality test and that stands as the position of our law.

[46] We do not consider it necessary to dive too deeply into the arguments that were raised and decided in all those cases. Suffice it to say that the most fundamental recent authority on 'proportionality' is the judgment of this court in *Alma Nudo* albeit that it concerned proportionality within the context of arts 5(1) and 8(1).

[47] In our assessment of the authorities including *Sivarasa, Azmi bin Sharom* and *Alma Nudo;* the considerations that are applicable to art 10 vis a vis the doctrine of proportionality and its constitutional grounding in art 8(1) are conceptually the same. To explain this, a brief recap of *Alma Nudo* is necessary.

[48] *Alma Nudo* concerned the constitutional validity of s 37A of the Dangerous Drugs Act 1952 ('the DDA 1952') to the extent that it allowed the prosecution to rely on double presumptions. In *Alma Nudo,* it was observed that prior to the passing of s 37A of the DDA 1952, the trier of fact could not rely on the presumption of trafficking without first making an actual factual finding on possession. Section 37A was then passed for the purpose of expressly permitting the trier of fact to presume trafficking by also presuming possession. This was then styled 'double presumption' or 'presumption upon presumption' as it removed any need for the prosecution, on a charge of 'trafficking', to first prove on the facts and beyond a reasonable doubt its constituent ingredient of 'possession'.

[49] The Federal Court found that, s 37A to the extent that it allowed the invocation of such a double presumption, was a wholly disproportionate measure as in effect it reversed the presumption of innocence that has long been afforded to any person accused of a crime. The Federal Court accordingly struck down s 37A as unconstitutional.

[50] In its assessment, the Federal Court in *Alma Nudo* highlighted how the doctrine of proportionality is contained within art 8(1) and how it is to be read in conjunction with art 5(1). By this reasoning, any 'law' that deprives a person of his life or personal liberty in express violation of art 5(1) must also comply with the guarantee of equal protection in art 8(1) by means of proportionality.

[51] We must state here at once that the doctrine of proportionality is not a means of judicial legislation. It does not involve judges sitting on the Bench and deciding what laws they like and do not like; nor does it involve a subjective review by judges of the desirability or popularity of any legislation. As we have stated in earlier decisions such as the authority cited by the applicant in *Lai Hen Beng v Public Prosecutor* [2024] 1 MLJ 225 ('Lai Hen Beng'), the courts are not at all to be concerned with legislative desirability (*Lai Hen Beng*, at [102]) as that is purely a question for Parliament.

[52] Proportionality as espoused in the overriding provisions on equality and equal protection of the law in art 8(1) advocates for a substantive limit against the power of Parliament to legislate as it pleases under the guise of valid legislative restrictions of fundamental liberties. In the case of *Alma Nudo,* this effective departure from equality in the form of proportionality was borne out by the fact that s 37A of the DDA 1952 so radically changed the notions of fair trial afforded to accused persons in all other criminal trials and across all other offences. The fact that this is the case was articulated by the unanimous decision of the Federal Court in *Alma Nudo* as follows:

> [150] Based on the factors above — the essential ingredients of the offence, the imposition of a legal burden, the standard of proof required in rebuttal, and the cumulative effect of the two presumptions — we consider *that s 37A constitutes a most substantial departure from the general rule, which cannot be justified and disproportionate to the legislative objective it serves.* It is far from clear that the objective cannot be achieved through other means less damaging to the accused's fundamental right under art 5. In light of the seriousness of the offence and the punishment it entails, we find that the unacceptably severe incursion into the right of the accused under art 5(1) is disproportionate to the aim of curbing crime, hence fails to satisfy the requirement of proportionality housed under art 8(1). (Emphasis added.)

[53] Reverting to art 10 from art 5(1), in *Pung,* it was submitted to the then Supreme Court that legislative restrictions imposed by Parliament against the

rights in art 10(1) through art 10(2) must be reasonable. As such, the Supreme Court was urged to find that the word 'restrictions' as it appears repeatedly in the sub-clauses of art 10(2) must be read as 'reasonable restrictions'. The Supreme Court in *Pung* disagreed with that approach of reading words into art 10(2) that are not there.

[54] Later, in *Azmi bin Sharom,* the Federal Court upheld the reasoning in *Pung* and accordingly decided that the court would not read words into art 10(2) including the word 'reasonable' to form the phrase 'reasonable restrictions'. As such, the Federal Court departed from what was held in *Sivarasa* to the extent that such a reading was upheld and that it gave rise to the 'reasonableness test'.

[55] Yet, the Federal Court in *Azmi bin Sharom* made it abundantly clear that the doctrine of proportionality is an entirely separate legal creature and legal existence of which the Federal Court unanimously adopted and endorsed. In its analysis, the Federal Court accepted the articulation of proportionality as it appears in art 8(1) as being applicable to limit the laws that Parliament can pass in line with art 10(2) to restrict the rights guaranteed by art 10(1). At [41]–[43], and consistent with earlier decisions such as *Sivarasa* and another Court of Appeal decision in *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213, the Federal Court in *Azmi bin Sharom* held that the proportionality test in art 8(1) applies to art 10(2).

[56] In other words, the doctrine of proportionality that ensures that 'legislation or executive action must not only be objectively fair but must also be proportionate to the object sought to be achieved' was adopted by the Federal Court *(Azmi bin Sharom,* at [42]). And hence, the emphatic articulation of proportionality in *Alma Nudo* though made in relation to arts 5(1) and 8(1) applies with equal force to and in the same way for art 10(2) read with art 8(1).

[57] Therefore, based on the state of the law as it presently stands, any laws passed by Parliament are not simply rendered valid because they are passed for the reasons stated in art 10(2) but that they must also be objectively fair and proportionate to the aim of and reasons for those restrictions.

[58] Leaving aside the 'reasonableness test' which has been ruled inapplicable, what remains is to test the validity of sub-s 9(5) through the lens of proportionality as espoused in art 8(1) read with art 10(2), and that too in accordance with established high judicial authority in cases such as *Azmi bin Sharom* and *Alma Nudo.*

Whether sub-s 9(5) satisfies the test of proportionality

[59] As alluded to earlier, the respondent argues that sub-s 9(5), to the extent that it seeks to ensure compliance with sub-s 9(1), is a proportionate legislative measure which Parliament has deemed necessary or expedient in the interest of the security of the Federation or any part thereof or public order.

[60] Neither we nor the parties in this case deny that sub-s 9(5) was passed for that purpose and therefore carries with it a legitimate legislative aim. The only question, applying the same analysis in *Alma Nudo* is whether the measure adopted in sub-s 9(5) is proportionate to that legitimate legislative aim.

[61] In his argument, the applicant seeks to rebut the respondent's assertion of proportionality. He claims that sub-s 9(5) is in effect harsh and oppressive and that it disproportionately seeks to curtail the right of freedom to peaceful assembly. For the avoidance of doubt, we must restate that the applicant in no way challenges the notification requirement of sub-s 9(1) but that it is his case that the means by which Parliament seeks to enforce compliance with it through the punishable offence in sub-s 9(5) is a disproportionate legislative measure.

[62] The applicant's reasons for contending that sub-s 9(5) is disproportionate are, briefly, as follows:

(a) the PAA 2012, when it was passed, represented a regime change from that of the Police Act 1967 (Act 344) ('the PA 1967'). Section 27 of the PA 1967 in effect stipulated that any assembly without a license would be deemed an unlawful assembly and all persons attending, found at or taking part in such assembly and all persons taking part or concerned in convening, collecting or directing such assembly shall be guilty of an offence. By contrast, the PAA 2012 no longer imposes such a stringent rule in that assemblies are no longer unlawful simply because they were conducted without license. Further, there is nothing in the PAA 2012 that allows the police to disperse an assembly purely for the fact that no sub-s 9(1) notice had been given prior;

(b) viewed in this way, there is nothing in the PAA 2012 that renders the fact of peaceful assembly itself unlawful other than failing to meet certain other conditions or restrictions relating to it. In other words, there is no such thing as an unlawful peaceful assembly because all such assemblies are by default lawful. The lack of notice under sub-s 9(1) cannot then, according to the applicant, be declared as a basis to render an otherwise peaceful assembly unlawful;

(c) the existence of sub-s 9(5) therefore serves to revive the earlier regime in the PA 1967 and in effect serves to take away the right after having created the illusion of giving it;

(d) sub-s 9(5) is in effect discriminatory because the notification requirement in sub-s 9(1) does not bear any impact on the attendee(s) of any assembly organised without such notice. In other words, no criminal action can perceivably be taken against the assembly-goer. All such action that is taken can only be taken against the organiser;

(e) even if action can be taken only against the organiser, the definition of 'organiser' is also vague and nebulous and can possibly include in some cases all persons in a corporation if the corporation is the organiser and even catch any person who has a role in promoting the assembly including the person who arranges for the bus to the assembly;

(f) further, according to the appliant, there are more than enough laws such as ss 141–160 of the Penal Code and provisions of the Societies Act 1966 and other written laws which more than comprehensively deal with non-peaceful and unlawful assemblies such that there is no perceivable nexus or justification for the enactment of sub-s 9(5) which deals with lawful assemblies that are by default legal as opposed to unlawful assemblies that are illegal;

(g) to fortify the point made immediately above, the applicant asserts that sub-s 9(5) allows for prosecutions against organisers of such assemblies irrespective of the fact that such assemblies organised without notice end peacefully and without arms;

(h) viewed as a whole, sub-s 9(5) does not have any nexus to peaceful assemblies and simply just thrusts an additional burden upon organisers to comply with the notice requirement irrespective of the nature of the assembly and its peaceful outcome;

(i) in this regard, sub-s 9(5) has the chilling effect of controlling whether peaceful assemblies can even, in the first place, be held as it completely disables urgent assemblies that are shorter than the notice period by threatening prosecution against the organiser and without any legal consequence to assembly-goers and bearing in mind the vague statutory definition of 'organiser'; and

(j) when adjudged in totality, it is the applicant's submission that sub-s 9(5) in effect serves more as a blanket prohibition than it does a restriction.

[63] In our assessment of the respondent's case, the respondent has not really substantively addressed any of the applicant's assertions with credible arguments. Having regard to the overall circumstances and nature of the arguments advanced by the applicant, we agree that sub-s 9(5) fails to meet the threshold of proportionality espoused in art 8(1).

[64] In explaining our reasons, we find that sub-s 9(5) is a discriminatory

A restriction that disproportionately curtails the right to the freedom of peaceful assembly guaranteed by art 10(1)(b).

B **[65]** We accept that the PAA 2012 was passed with the express and implied intention of preserving the right to peaceful assembly guaranteed by art 10(1)(b). However, in this equation, it does not appear to us that sub-s 9(5) when read with sub-s 9(1) is, when considered in totality, consistent with that noble intention.

C **[66]** If sub-s 9(5), as the respondent suggests, is to ensure that the police are notified of any upcoming assemblies so that they can be on guard to take protective action, then such an intention is clearly not manifest in the way it is couched. For one, we agree with the applicant that it imposes a separate and onerous duty on the organiser of the assembly to provide notice quite apart from the nature of the assembly.

D

[67] In other words, an organiser, whomever that person is and who fails to give notice of an assembly can be charged with and convicted of an offence under sub-s 9(5) even if the assembly takes place and ends peacefully. This E offence discriminates the organiser against the gatherers of his or her assembly who commit no offence while the organiser is guilty of one.

[68] In this regard, we cannot agree with the respondent that sub-s 9(5) simply seeks to incentivise or strictly enforce the notice requirement in F sub-s 9(1) to protect, preserve, or balance on the one side public order and security and on the other, the constitutional right to assemble peaceably. In other words, the respondent's reading of sub-s 9(5) is only valid if we adopt a myopic view of that subsection and ignore the rest of its legal implications and overall chilling effects on an otherwise valid legal right to assembly peaceably G and without arms.

[69] In this sense, when considering and adjudging sub-s 9(5) and its implications on a whole, we find much force in the point made by the applicant that sub-s 9(5) appears to be a blanket prohibition than a restriction. And, in H this regard, it is crucial that we factor into our analysis the fundamental difference between the two terms.

[70] To our minds, the word 'restriction' suggests that the act in question is permissible but that instead of a blanket right to exercise it in howsoever way I one pleases, Parliament can impose certain restrictions or rules regarding the exercise of the right. In this sense, Parliament does not interfere with or control the substantive right itself rather, it regulates the way and manner and means by which it is done without hampering the right itself. An example of this is contained in s 15 itself which stipulates, in our view, some examples of

restrictions, eg:

Restrictions and conditions

(1) The Officer in charge of the police District may impose restrictions and conditions on an assembly for the purpose of security or public order, including the protection of the rights and freedoms of other persons.

(2) The restrictions and conditions imposed under this section may relate to —

(a) the date, time and duration of assembly;

(b) the place of assembly;

(c) the manner of the assembly;

(d) the conduct of participants during the assembly;

(e) the payment of clean-up costs arising out of the holding of the assembly;

(f) any inherent environmental factor, cultural or religious sensitivity and historical significance of the place of assembly;

(g) the concerns and objections of persons who have interests; or

(h) any other matters the Officer in charge of the police District deems necessary or expedient in relation to the assembly.

(3) Any person who fails to comply with any restrictions and conditions under this section commits an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit.

[71] By stark contrast, a 'prohibition' is a total denial of a given right. So, for instance, a prohibition against the right to assemble peaceably would entail a measure that completely denies any person from performing that act whatsoever.

[72] In this regard, sub-s 9(5) bears several implications that matches it as a prohibition. The first real legal effect of that subsection is that no person is entitled to organise a peaceful assembly unless he or she first provides notice under sub-s 9(1) for otherwise they are liable to a criminal sanction. This includes urgent assemblies that could not otherwise be held within a number of days less than the notice period. While people who attend the said assembly can suffer no criminal action for attending without notice, the organiser (whoever that might be) remains liable to a criminal charge. The result is a chilling effect on all organisers who are discouraged from ever organising such assemblies for fear of prosecution for a lack of notice.

[73] The overall result produced from such a conclusion is that the Parliamentary intent here appears to be that assemblies cannot ever be held in

such a situation due to the impossibility of being able to give any notice of it. This complete denial of the right to assemble is clearly not a restriction but a disguised prohibition.

[74] Next, and this point also speaks to sub-s 9(5)'s nexus to the legitimate aim in art 10(2)(b), is the fact that the failure to give notice as per sub-s 9(1), does, for the purposes of sub-s 9(5), remain an offence even if the assembly was conducted peacefully and even when it ends peacefully. In that sense, we cannot appreciate how sub-s 9(5) can by any means be said to bear any nexus to the preservation of public order and security if a person may be charged for holding what was an otherwise peaceful assembly.

[75] Whilst s 21A empowers the police with the consent of the public prosecutor to offer to compound the offence under sub-s 9(5) instead of to pursue a criminal prosecution, that decision is still vested in the authorities who could still determine to charge the organiser as happened in the instant case before us. We add for emphasis that whether or not there is compliance with the notice requirement under sub-s 9(1), there is no question that should any such assembly turns unruly, becomes unlawful or ceases to be peaceful, the police are fully empowered to take action in respect of offences against public tranquillity under Chapter VIII of the Penal Code. Indeed sub-s 20(1) too itself empowers the police to arrest any organiser or participant who, during an assembly refuses to adhere to any restrictions under s 15 or has in his possession any arms; whilst sub-s 21(1) vests in the police the power to disperse any assembly where for example, any person at the assembly commits any offence under any written law; or where the participants engage in disorderly conduct or violence towards persons or property in respect of which the failure to abide by any such order for dispersal is an offence under sub-s 21(3).

[76] In our view, assemblies do not often happen spontaneously or serendipitously. It is a very logical and reasonable thing to conclude that it takes time, planning and resources to get more than two people to gather at any location and place with the intention to assemble peaceably.

[77] From this perspective, the act of criminalising the right of any citizen to organise an assembly is no different than any incursion of another citizen's right to attend such an assembly. Yet, sub-s 9(5) makes this distinction by criminalising the organising of an assembly but not the attending of the assembly itself. To make matters worse, the offence in sub-s 9(5) fastens even in a situation where the assembly so organised ends peacefully as its organiser may nonetheless be called to face a criminal charge for, in effect, organising a peaceful assembly — a right otherwise guaranteed to him by art 10(2)(b).

[78] When we consider this scenario in context, it yet again presents itself to us as a prohibition against a citizen's right to assemble peacefully rather than a restriction of it.

[79] In this assessment, we are convinced in particular by the argument advanced by counsel for the amici curiae, The Clooney Foundation For Justice and SUARAM. In his assessment of proportionality in international jurisprudence and which our constitutional law reflects, the existence of less intrusive legislative measure or restrictions though not entirely dispositive on constitutionality, is an important consideration in adjudging the proportionality of that measure or restriction.

[80] In other words, if less intrusive measures are available to Parliament to restrict the right in question, the fact that the more intrusive measure was used points to disproportionality.

[81] In this regard, learned counsel Lim Wei Jiet referred to the judgment of the Constitutional Court of South Africa in *Mlungwana and Others v S and Another* [2018] ZACC 45 ('Mlungwana') in holding as follows:

> [96] The applicants and amici curiae identified various less restrictive means to incentivise the giving of notice under the Act. These are —
>
> (a) notice assures the conveners that the police cannot restrict the protest under section 9(1)(c);
>
> (b) civil liability for riot damage under section 11 that follows from a failure to take reasonable steps to prevent the damage (which includes giving notice);
>
> (c) existing common law and statutory crimes regarding public disruption and violence;
>
> (d) enhanced civil liability for conveners who fail to give notice;
>
> (e) administrative fines; and
>
> (f) amending the definition of gathering such that notice is only required when police presence will be necessary.
>
> [97] The respondents advance two responses to these less restrictive means. First, that none of these place criminal liability at the foot of the convener for failing to give notice. It may be true that there is no other way of punishing a convener for failing to give notice other than criminalising such a failure. But this was not the mainstay of the respondents' case. As explained above, the argument was not that failure to give notice should be criminalised regardless of whether it deters the failure to give notice. Instead, the argument is that the purpose behind section 12(1)(a) is to criminalise failure to give notice precisely because it incentivises the giving of notice. Thus to argue that no other means can punish the convener is to change the purpose of section 12(1)(a) to a purpose that was not

substantiated on the papers before us. No argument was made as to why failure to give notice should be criminalised independently of encouraging conveners to give notice.

[82] The Constitutional Court was not persuaded by any of the arguments advanced by the respondents in that case and in rejecting those arguments observed thus:

> [99] The respondents' second response is that the applicants have failed to provide evidence of how these less restrictive means incentivise notice as effectively as the criminal sanction does. This argument is misplaced. *The onus is on the respondents to prove that the limitation created by section 12(1)(a) is justified. In that event, there is no reason to think why the less restrictive incentives identified by the applicants and amici will not work just as well as criminalisation, without the far-reaching consequences flowing from a conviction.* (Emphasis added.)

[83] Accordingly, the South African Court found that s 12(1)(a) of their Regulation of Gatherings Act 205 of 1993 ('the RGA 1993') which is substantively similar to our sub-s 9(5) was a disproportionate restriction to the right of peaceful assembly and deemed the said s 12(1)(a) unconstitutional.

[84] For convenience, the said s 12(1)(a) of the RGA 1993 which is very similar in principle to our s 9(5) provides:

> 12 Offences and penalties
>
> (1) Any person who:
>
> (a) convenes a gathering in respect of which no notice or no adequate notice was given in accordance with the provisions of section 3; ...
>
> (b)-(j); ...
>
> shall be guilty of an offence and on conviction liable to a fine not exceeding R20000 or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

[85] Reverting to our case and in relation to our sub-s 9(5), we do not for a moment doubt the respondent's noble argument that sub-s 9(5) is intended to protect public rights and order in line with the purposes stated in art 10(2)(b) especially in cases where the police are duly informed of an upcoming assembly and can take all measures necessary to preserve public order and security.

[86] That said, when we consider sub-s 9(5) in totality and the major problems that arise from the overall effects of sub-s 9(5) including on a right of any person to organise an assembly; and how sub-s 9(5) read with sub-s 9(1) has a prohibitory effect on the right to assemble peaceably, we have no reservation in concluding that sub-s 9(5) is a disproportionate incursion into

the right to peaceful assembly guaranteed to all citizens by art 10(1)(b). We further conclude that sub-s 9(5) is in excess of any restrictions that may be imposed on any of the permissible grounds stated in art 10(2)(b).

[87] Given our aforesaid conclusion, we find that sub-s 9(5) is not validly enacted under art 10(2)(b). It cannot therefore be deemed as validly restricting the right guaranteed to all citizens by art 10(1)(b). Subsection 9(5) therefore violates the right to peaceful assembly under art 10(1)(b) and must be struck down as null and void under art 4(1).

Final observations

[88] Considering our substantive deliberations on the constitutional validity on sub-s 9(5) in this case, we see no reason to delve deeper into the arguments raised for or against the proposition in either *Nik Nazmi* or *Yuneswaran.* Suffice it for us to say that the conclusion arrived at by the Court of Appeal in *Nik Nazmi* is correct and that as such, *Yuneswaran*'s conclusion is wrong. *Yuneswaran* is hereby overruled and shall have no value as judicial precedent.

[89] As for the questions, we answer them as follows.

[90] Regarding question 1 (first part), our answer is in the *affirmative* — we find that s 9(5) is unconstitutional for it being inconsistent with art 10(2)(b) read with art 8(1) of the FC. As for the second part of question 1, we do not consider it necessary to deal with the stare decisis point for the reasons adverted to earlier. To briefly recapitulate our earlier point, both *Nik Nazmi* and *Yuneswaran* were superseded by apex court decisions in *Azmi bin Sharom* and *Alma Nudo* and our reliance on those cases renders moot any discussion on whether the Court of Appeal in *Yuneswaran* ran afoul of *Young* and *Dalip* by departing from *Nik Nazmi.*

[91] As for question 2, it asks whether sub-s 9(5) of the PAA 2012 is unconstitutional for being inconsistent with art 10(2)(a) of the FC on the rights to freedom of speech and expression read with art 8(1) of the FC. Considering our finding that sub-s 9(5) is void for violating the right to freedom of peaceful assembly, we do not consider it necessary to discuss further the substantive arguments on its implications on the rights to freedom of speech and expression. We therefore decline to answer question 2.

CONCLUSION

[92] For the reasons aforesaid, we have answered the constitutional questions in this case in such a manner that should enable the High Court to justly and expeditiously dispose of the proceedings before it in accordance with

our judgment herein and otherwise according to law. We do hereby and accordingly remit this case to the High Court.

[93] Finally, it is our view that this is a public interest litigation and, as such, there shall be no order as to costs in respect of these proceedings before us.

Section 9(5) of the PAA ruled unconstitutional for being inconsistent with art 10(2)(b) read with art 8(1) of the Federal Constitution..

Reported by Ashok Kumar